In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1789

NICHOLAS PICCHIONE and LILLIAN B. PICCHIONE,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. App. A 37-42) is reported at 54 T.C. 1490. The opinion of the court of appeals (Pet. App. C 44-49) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1971 (Pet. App. D 50). The petition

for a writ of certiorari was filed on June 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the deferred payments received by petitioner in 1964, 1965 and 1966, pursuant to a sale of a copyright in 1946, constituted ordinary income rather than capital gain by reason of the exclusion of copyrights from the definition of a capital asset in a 1950 amendment to the Internal Revenue Code.

2. Whether the application of the 1950 statutory change to payments received in 1964, 1965 and 1966 as a result of the 1946 sale of the copyright is consistent with due process limitations.

STATUTES INVOLVED

The pertinent provisions of Section 117 of the Internal Revenue Code of 1939 and of Sections 652, 662 and 1221 of the Internal Revenue Code of 1954 are set forth in the appendix to the petition (Pet. App. E 51-54).

STATEMENT

Petitioner[1] is a certified public accountant, who sometime between 1941 and 1944 originated a record book entitled the "Dome Simplified Weekly Bookkeeping Record" (hereinafter "Record Book"). Prior to

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[1] References to "petitioner" are to Nicholas Picchione. Lillian B. Picchione is a party solely because joint income tax returns were filed for the years in issue.

1945, petitioner transferred his entire interest in the Record Book to his wife and son, as equal co-owners. During 1945, they secured a copyright on the Record Book and, on January 2, 1946, sold their interests to a corporation of which petitioner was the sole stockholder, for a consideration of 20 percent of the gross selling price of all books sold until October 1, 1973. At the time of the sale, none of the parties was engaged in the business of inventing or originating copyrights of literary materials. (Pet. App. A 38; Pet. App. C 44-45.)

In 1952, petitioner's wife and son transferred their rights to the future payments to the Dome Enterprises Trust. The trust instrument named petitioner as initial trustee and beneficiary, and provided that after the trust had accumulated income of $50,000, the trustee was to pay the net income to petitioner for life. By January 1, 1964, the trust had accumulated the $50,000, and was paying its annual income to petitioner, a cash basis taxpayer. (Pet. App. A 38; Pet. App. C 44-45.)

On its 1964, 1965 and 1966 fiduciary returns, the trust reported receipts from the "sale of the copyright" as long-term capital gain and claimed deductions for the amounts paid to petitioner. Petitioner reported the receipts from the trust as long-term capital gain. The Commissioner determined that the tax character of the receipts was governed by the definition of "capital asset" in Section 1221 of the Internal Revenue Code of 1954, and that they were taxable as ordinary income. Both the Tax Court and the court of appeals upheld the Commissioner's determination,

rejecting petitioner's claim that the applicable provisions of the 1939 Code, as they stood at the time of the sale of the copyright in 1946, should govern the tax character of the receipts. (Pet. App. A 38-39, 42; Pet. App. C 45, 49.)

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other reason for further review.

1. Prior to 1950, Section 117(a)(1) of the Internal Revenue Code of 1939 (Pet. App. E 51-52) defined the term "capital asset" without reference to copyrights. A taxpayer who did not hold a copyright primarily for sale in the ordinary course of his business and who retained the copyright for the requisite holding period therefore was entitled to have profits from a sale or exchange taxed at favorable capital gains rates. By Section 210(a) of the Revenue Act of 1950, c. 994, 64 Stat. 906, 932, Congress amended the definition of "capital asset" specifically to exclude copyrights, and made the amendment "applicable with respect to taxable years beginning after the date of the enactment * * *" (Section 210(c)). The exclusion has been carried forward as Section 1221(3) of the 1954 Code (Pet. App. E 53-54). The copyright involved here was sold in 1946 but, pursuant to the terms of sale, petitioner (via the Dome Trust) received deferred payments in the form of 20 percent of gross sales during 1964, 1965 and 1966.

In holding that the tax character of petitioner's 1964-1966 receipts was to be determined by reference

to the definition of "capital asset" in force during the years of receipt of the payments rather than the year of sale of the copyright, the courts below reached the only conclusion compatible with the legislative history of the 1950 amendment. Both committee reports on the amendment explicitly directed that the rule of *Snell* v. *Commissioner*, 97 F.2d 891 (C.A. 5), was to apply to payments from the sale of a copyright which were received after the effective date of the amendment. H. Rep. No. 2319, 81st Cong., 2d Sess., p. 93; S. Rep. No. 2375, 81st Cong., 2d Sess., p. 85. That case holds that upon an installment sale, the law in effect at the time payment is made rather than at the time of the sale governs the character of the income.[2]

Petitioner mistakenly contends (Pet. 17-21) that the 1950 amendment requires a wholly prospective application of its change in the definition of a capital asset, and that the courts' examination of the pertinent legislative history violated the principle of statutory construction that committee reports are to be used to resolve ambiguities, not to create them. But there is an ambiguity in the effective date provision of the 1950 amendment, and by resorting to the legislative history, the courts were able to resolve it. Moreover, the application of the 1950 amendment in the circumstances of this case involving the years 1964-1966 does not constitute a retroactive exercise of the

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[2] Petitioner's argument (Pet. 8-10) based on the word "held" in Section 1221 of the Code was fully answered by the court of appeals (Pet. App. C 46-47). It is sufficient to note here that petitioner's interpretation of the term cannot be squared with the unequivocal legislative history.

taxing power, but merely a determination of the way in which income actually received in 1964, 1965, and 1966, will be taxed in those years. See *Corliss* v. *Bowers*, 281 U.S. 376; *Burnet* v. *Wells*, 289 U.S. 670, 682-683.

Petitioner contends (Pet. 29-35) that *Snell* v. *Commissioner*, *supra*, no longer has vitality by virtue of this Court's decision in *Commissioner* v. *Arrowsmith*, 344 U.S. 6. *Arrowsmith* is inapposite, however, since it involved a situation where the tax treatment of a *subsequent adjustment* of an earlier sale or liquidation was determined by looking back to the earlier transaction, not one where a subsequent amendment to the law changed the tax treatment of amounts received after the date of the amendment. At all events, even if *Snell* could be characterized as "questionable case law," as petitioner suggests (Pet. 32), the court of appeals correctly pointed out (Pet. App. C 47-48) that its consideration of *Snell* was merely to verify the intent of Congress.

There is no conflict with *Reo Motors* v. *Commissioner*, 338 U.S. 442, as petitioner asserts (Pet. 12-16). The taxpayer there was attempting to obtain the benefit of a 1942 statutory change to convert a 1941 capital loss into an ordinary loss, when the 1941 statute provided only for capital treatment. In the instant case no attempt is being made to change the tax results for any year prior to the effective date of the 1950 amendment.

2. Petitioner's due process contention, based on the alleged retroactivity of the statute, does not merit extended discussion. Apart from the fact that the

1950 amendment was not a retroactive exercise of the taxing power, due process contentions based on the retroactivity of income tax statutes have consistently been rejected by this Court. See, *e.g.*, *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 20; *Lynch* v. *Hornby*, 247 U.S. 339; *Burnet* v. *Wells*, *supra*; *United States* v. *Hudson*, 299 U.S. 498.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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